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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1233

JANE MITCHELL - - - - - Petitioner

versus

MID-CONTINENT SPRING COMPANY OF KENTUCKY - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES C. HICKEY
HIRAM ELY, III
EWEN, MACKENZIE & PEDEN, P.S.C.
2100 Commonwealth Building
Louisville, Kentucky 40202

JACK GREENBERG
ERIC SCHNAPPER
PATRICK O. PATTERSON
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Petitioner Jane Mitchell

WESTERFIELD-BONTE CO., 618 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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No. _____

JANE MITCHELL - - - - - *Petitioner*

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MID-CONTINENT SPRING COMPANY OF KENTUCKY - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Jane Mitchell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals(app. A, *infra,* p. 1a) appears at 583 F. 2d 275. The opinion of the District Court (app. B, *infra,* pp. 22a) was entered on November 26, 1974, and is unreported. The Judgment of the District Court (app. C, *infra,* pp. 33a) was entered on October 14, 1976, and is also unreported.

JURISDICTION

The judgment of the Court of Appeals (app. D, *infra,* p. 37a) was entered on September 8, 1978, and rehearing and hearing *en banc* was denied on November 9, 1978 (app. E, *infra,* p. 38a). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant portion of Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g), in effect at the time this litigation commenced in 1971 is set forth below:

> "(g) If the court finds the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable . . ."

Section 706(k) of Title VII is as follows:

> "(k) Attorney's fee. In any action or proceeding under this title [42 U.S.C. §§2000e *et seq.*] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

QUESTIONS PRESENTED

1. Where an employer has engaged in a ten year practice of intentional discrimination in the hiring and promotion of employees, must injunctive relief be limited, as the court of appeals held, to a general prohibition against future discrimination, or may a district court grant affirmative relief designed to restore victims to their rightful places and require specific hiring and promotion levels to assure that intentional violations do not recur?

2. If in a Title VII class action it is impossible to calculate with precision the injury suffered by each class member, may the district court assess the total class back pay against the defendant and allocate it in an equitable manner among the class members, or must the court, as the Sixth Circuit held, deny all monetary relief?

3. Should *United States* v. *International Brotherhood of Teamsters,* 431 U. S. 324 (1977), be extended to require the victims of sex discrimination to explain why they did not apply for vacancies which were not disclosed to female employees in a plant in which there was no procedure for bidding on such jobs?

4. Did the court of appeals correctly hold that in a Title VII class action a reasonable attorneys' fee

cannot be awarded for legal services resulting in class injunctive relief unless the plaintiff also wins a substantial class back pay award?

STATEMENT OF THE CASE

This employment discrimination class action was filed in 1971 and is making its second appearance before this court.

Following a trial in November, 1974, the District Court entered Findings of Fact and Conclusions of Law (App. B, *infra*) which held that the exclusive assignment of female new hires to Mid-Continent's lowest paying job classification, the subsequent limitation of females to this one classification, the maintenance of separate seniority rosters on the basis of sex, and a different shift transfer policy for female employees violated Title VII. These unlawful policies and practices had been in effect on July 2, 1965, and continued to the time of trial in spite of investigations by the U. S. Department of Labor and the U. S. Equal Employment Opportunity Commission in 1969.

The Court of Appeals for the Sixth Circuit affirmed the liability holding in favor of the class of female employees, but reversed the class back pay award, all the affirmative class relief, and the award of attorneys' fees for class representation (App. A, *infra.*) A brief review of the relevant facts and history will set the case in proper perspective:

Initial hiring and assignment decisions were made by Mid-Continent's plant superintendent. No specialized skills were required for any production jobs. All

new hires, male and female, had the same qualifications. Mid-Continent was a non-union company and did not post job vacancies. It had no formal procedure for transfer or promotion, and followed the segregated seniority rosters only when it suited them. All company employment decisions were subjective and based on sex stereotypes. From July 2, 1965, to the time of trial in November, 1974, there were 418 male job openings and opportunities for female employees. Only one female employee was ever assigned to a male job and that was brought about by an investigation by the U. S. Department of Labor in July, 1969. The only employee who had the temerity to question Mid-Continent's sexual caste policies and practices, Jane Mitchell, was fired by the company on August 11, 1969.

The District Court found that a female employee with knowledge of Mid-Continent's policies and practices could hardly be expected to make a meaningless and futile request to be transferred to a male job. The Court also found that affirmative relief would be required to insure equal job opportunities at the Mid-Continent plant for present female employees and to insure that future hires would be assigned on a non-discriminatory basis (App. B, *infra*, pp. 29a-31a).

The Court appointed Special Master determined, and the District Court confirmed, that individual testimony concerning what would have happened if Mid-Continent had complied with Title VII beginning on July 2, 1965, and if there had been an atmosphere of equal employment opportunity rather than defiance of Title VII at Mid-Continent, would not be helpful in

resolving the quagmire of hypothetical judgments. He stated in his report to the Court as follows:

> "Considering the size of the class in this case, (340 women), the time period involved (almost 10 years), the imprecise effect of the discrimination (the seniority policies, for example), and the impossibility of determination of what each claimant's position would have been but for the discrimination, the Special Master has determined that a formula of comparability and a class-wide approach is the only practical method of determining economic loss and back pay due in this case."

The class wide approach and formula of comparability devised by the Special Master and confirmed by the District Court resulted in back pay awards for 238 members of the class totalling $225,885 (a large part of this was interest) for the entire 10-year period of discrimination. Further, the District Court provided the following affirmative relief in the Judgment:

> (c) For a period of five years from the date of this final Judgment and permanent injunction defendant shall assign at least 33⅓% of all male new hires to machine operator positions in Secondary and Grinding, and shall assign at least 33⅓% of all female new hires to the previously all male job classifications in defendant's plant (App. C, *infra*, pp. 34a-35a)

Mid-Continent obtained a stay of this modest affirmative relief on October 26, 1976, and the Court of Appeals for the Sixth Circuit reversed it along with the conservative class back pay award on September

8, 1978. The Court further vacated the award of attorneys' fees. These decisions by the Sixth Circuit have raised important questions concerning the future effectiveness of Title VII in eradicating employment discrimination and the determination of the Courts to provide relief to the victims.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Rejection of Affirmative Injunctive Relief Is Inconsistent With the Decisions of This Court and of Other Circuits.

The district court, acting on a record showing a decade of knowing and intentional violation of federal law, sought to fashion an injunctive remedy that would fully carry out the purposes of Title VII. The trial court directed that the company for a period of five years give its present female employees priority in filling vacancies in previously all-male positions and that at least one-third of the employees transferred or promoted to such positions be female; it also required that for the same period one-third of all newly-hired females be assigned to previously all-male jobs and that one-third of all newly-hired males be assigned to previously all-female jobs (*infra*, pp. 34a-35a). The district court explained that such affirmative injunctive relief was "essential to remedy the continuing consequences of past discrimination . . ." (*infra*, p. 31a).

The court of appeals reversed, holding that it was improper to afford any injunctive relief whatever, other than a general prohibition against discrimination. It

based this order on a single fact, that in the two years *after* the initial finding of liability the company had hired two female employees into previously all-male jobs. It reasoned that this demonstrated "that all jobs were, in fact, open to females" (*infra,* p. 21a) and thus rendered improper the district court's detailed decree.

The decision of the court of appeals is squarely inconsistent with the decision of this Court in *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976). *Franks* held that in fashioning injunctive relief in a Title VII case the district court has a "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 424 U. S. at 770. Similarly, *Albermarle Paper Co.* v. *Moody,* 422 U. S. 405 (1975), requires the district courts to fashion "the most complete relief possible." 422 U. S. at 421.

With regard to the company's present female employees, some affirmative relief was clearly necessary if they were to have a reasonable opportunity to reach the positions they would have occupied but for the company's past discrimination. *Franks, supra,* 424 U. S. at 768. It would have perpetuated the effect of past discrimination to require female employees to compete for vacancies with men who have greater experience as a result of past discrimination, or who were not Mid-Continent employees when the present female employees were excluded from positions because of their sex. Certainly the district judge could have given a particular woman absolute priority for a

particular job from which she had been unlawfully excluded. In this case the virulence and longevity of of the company's violation precluded such precise calculations of each employee's rightful place; in these circumstances the order devised by the district court was reasonably directed toward placing women employees in their rightful places. See 424 U. S. at 770.

The district court was also correct in requiring for a period of five years that a third of all transfers or promotions to previously all-male jobs be granted to present female employees, and that a third of all newly-hired employees of either sex be assigned to jobs previously restricted to the other sex. The court did not require Mid-Continent to hire any particular number of men or women. In view of the evidence that company officials had for over nine years knowingly violated federal law, the district court was not obligated to assume the company would obey an injunction cast in the same general terms as the federal statute; that history clearly justified a far more specific preventive order. On appeal the company did not complain that there were insufficient vacancies in previously all-male or all-female jobs, or that it could not find qualified women; it objected, rather, that a male applicant might refuse an assignment "if his male ego is offended by working with a group of the opposite sex."[1]

The sole ground on which this aspect of the district court's finding of liability, and while the question of injunctive relief was still pending before the district court, two women had succeeded in moving into previ-

[1]Brief for Appellants, No. 77-3009, 6th Cir., p. 42.

ously all-male positions. The Sixth Circuit made no findings as to how newly hired men and women had been assigned during that period. The two transfers were taken as conclusive proof that the company was no longer discriminating in initial assignment, thus precluding any specific relief in that area. Whether those transfers, made under the gun of federal litigation, were to be accorded any significance was a matter for resolution by the district court; in refusing to credit such eleventh hour changes the district court was well within the broad remedial authority accorded by *Albemarle* to produce "a 'just result' in the light of the circumstances peculiar to the case," 422 U. S. at 424, and it was acting in accordance with this Court's admonition that an employer's "later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its obligation to afford relief to those who suffered because of it." *United States* v. *International Brotherhood Of Teamsters,* 431 U. S. 324, 341-42 (1977). Cf. *Albemarle Paper Co.* v. *Moody, supra,* 422 U. S. at 413-23.

Other circuits have held in similar circumstances that the district courts have wide latitude in fashioning affirmative relief to remedy discrimination in employment. *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 504 F. 2d 1017, 1026-28 (1st Cir. 1974), *cert. denied,* 421 U. S. 910 (1975), *United States* v. *Wood Lathers Local 46,* 471 F. 2d 408, 413-16 (2d Cir.), *cert. denied,* 412 U. S. 939 (1973); *N.A.A.C.P.* v. *Allen,* 493 F. 2d 614, 618-22 (5th Cir. 1974); *United States* v. *City of*

Chicago, 549 F. 2d 415, 436-37 (7th Cir. 1977), *cert. denied,* 434 U. S. 875 (1978); *Carter* v. *Gallagher,* 452 F. 2d 315, 328-31 (8th Cir. en banc), *cert. denied,* 406 U. S. 950 (1972); *United States* v. *Ironworkers Local 86,* 443 F. 2d 544, 553-54 (9th Cir.) *cert. denied,* 404 U. S. 984 (1971). Following this Court's decision in *Regents of the University of California* v. *Bakke,* 57 L. Ed. 2d 750 (1978), a conflict has developed between the view of the Fifth and Eighth Circuits that the decision should be viewed as "reaffirming the equitable power of federal courts to remedy the effects of unconstitutional acts through race-conscious means,"[2] and the view of the Fourth Circuit that the *Bakke* decision "indicates that the imposition of hiring quotas in Title VII cases is still an open question."[3] This question may well be resolved by the Court's decision in *United Steelworkers* v. *Weber,* No. 78-432, and Petitioner suggests that the Court may wish to defer acting on this petition pending the decision in that case.

II. The Decision Below, Denying Any Relief to Proven Victims of Discrimination Unless the Amount of Back Pay Can Be Calculated Individually for Each Victim, Conflicts With the Decisions of This Court and of Four Other Circuits.

The district court adopted a classwide approach to the problem of calculating back pay awards where the employer's past unlawful conduct has made precise

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[2] *Morrow* v. *Dillard,* 580 F. 2d 1284, 1294 (5th Cir. 1978); *Firefighters Institute for Racial Equality* v. *City of St. Louis,* 18 FEP Cases 1083, 1087 (8th Cir. 1978).

[3] *Sledge* v. *J. P. Stevens Co.,* 18 FEP Cases 261, 275 (4th Cir. 1978).

individual determinations impossible. The court of appeals rejected this approach, holding as follows:

> If it is true that individual determinations are impossible, the class action aspects of this case should forthwith be dismissed. No individual should ever be permitted to recover damages in a case which he or she finds it is impossible to prove (*infra*, p. 16a).

Four other circuits, "[g]iven a choice between no compensation for black employees who have been illegally denied promotions and an approximate measure of damages," have chosen the latter. *Stewart* v. *General Motors Corp.*, 542 F. 2d 445, 453 (7th Cir. 1976), *cert. denied*, 433 U. S. 919 (1977). The choice of the court below conflicts with that made by the Fifth,[4] Seventh,[5] Eighth,[6] and Tenth[7] Circuits and with

[4] *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 260-63 (5th Cir. 1974) ("when the class size or the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or the illegal practices continued over an extended period of time calls forth the quagmire of hypothetical judgment . . ., a class-wide approach to the measure of back pay is necessitated").

[5] *Stewart* v. *General Motors Corp.*, *supra*., 542 F. 2d at 452-53 ("the utilization of an individualized calculation is impossible. Because General Motors had no objective standards by which to measure whether a given employee deserved a promotion, deciding in individual cases whether a particular person would have been promoted but for racial discrimination would lead the district court into a 'quagmire of hypothetical judgment,' . . . in which any supposed accuracy in result would be purely imaginary").

[6] *Wells* v. *Meyer's Bakery*, 561 F. 2d 1268, 1274-75 (8th Cir. 1977) (following the Seventh Circuit's decision in *Stewart* in light of this Court's decision in *Teamsters*).

[7] *Love* v. *Pullman Co.*, 569 F. 2d 1074, 1077 (10th Cir. 1978) (in view of the impossibility of individual determinations, "the use of averages derived from the separate classifications is a reasonable basis for a back pay formula").

this Court's recognition that in fashioning Title VII remedies the "process of recreating the past will necessarily involve a degree of approximation and imprecision." *United States* v. *Teamsters*, *supra*, 431 U. S. at 372.

The Sixth Circuit's decision is also inconsistent with decisions of this Court holding that, once a class-wide Title VII violation has been established, each potential victim of the proven discrimination is presumptively entitled to relief; the burden is then on the employer to prove that such potential victims were denied employment opportunities for lawful reasons. *United States* v. *Teamsters*, *supra*, 431 U. S. at 359-62 and n. 45; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U. S. at 772-73. The decision below has deprived the class members of the relief to which they are presumptively entitled without requiring the employer to come forward with any of the evidence necessary to rebut that presumption.

Moreover, this Court has held that:

> given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the back pay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumtances peculiar to particu-

lar cases. *Albemarle Paper Co.* v. *Moody, supra,* 422 U. S. at 421-22 (footnote omitted). See also, *City of Los Angeles* v. *Manhart,* 435 U. S.

General application of the Sixth Circuit's reason for denying back pay in this case would frustrate the purposes of Title VII. The prospect of a back pay award should act as "the spur of catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albermarle Paper Co.* v. *Moody, supra,* 422 U. S. at 417-18, quoting *United States* v. *N. L. Industries, Inc.,* 479 F. 2d 354, 379 (8th Cir. 1973). The back pay remedy as construed by the Sixth Circuit would have the opposite effect: employers and unions would have an incentive to increase and prolong their discrimination against minorities and women because such conduct would make it more difficult to calculate individual back pay awards with precision; careful destruction of potentially incriminating personnel records would provide additional protection against monetary liability. The Sixth Circuit's role, requiring dismissal of class claims wherever an employer has succeeded in making individualized determinations impossible, would undermine the congressional purpose to eliminate discrimination through "cooperation and voluntary compliance," *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 44 (1974), and would result in a corresponding increase in the already heavy load of Title VII cases being filed in the federal courts. See

Administrative Office of the United States Courts, *1978 Annual Report of the Director* at 88.

Many of the cases filed under Title VII involve "complex and pervasive" issues of "systemic" and "institutional" discrimination[8] by state and federal government agencies as well as by large corporate employers. If the district courts are to manage this volume of complex cases in a way which furthers the purposes of Title VII, they must not be burdened with requirements of unrealistic exactitude in making individualized remedial determinations for hundreds or thousands of claimants in every case; rather, they must be allowed to adopt reasonable, flexible approaches to the problem of fashioning relief for the identified victims of proven discrimination.

III. The Court Below Has Misapplied the Teamsters Decision to the Factual Setting of This Case.

The Sixth Circuit acknowledged that the respondent's "system of sex-segregated job classifications and assignments was aggravated by the absence, until May, 1974 (three years after this action was filed), of any company-wide posting of job vacancies, and of any procedure by which employees could formally bid on higher-paying jobs" (*infra,* p. 8a). However, relying on this Court's decision in *United States* v. *Teamsters, supra,* the court below held that in order to be identified as a potential victim of this system who therefore would be presumptively entitled to back pay,

[8]See S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971).

each female employee would be required to prove either that she had applied for a male-only job or that she would have applied but for the defendant's unlawful practices (*infra,* pp. 17a-19a).

Such a requirement may be appropriate where an employer has a formal process by which employees may express an interest in transfer or promotion to a higher-paying job. In *Teamsters,* the Court indicated that employees could file "both an initial and a followup application." 431 U. S. at 368. But the Sixth Circuit has mechanically applied the *Teamsters* formulation of the burden on non-applicants in that case to a factual setting in which all female employees were necessarily non-applicants because there was no way for them to learn of vacancies for which they might apply and there was in any event no procedure for them to bid on any such vacancies. In these circumstances all female employees were the potential victims of the respondent's discriminatory practices, and accordingly all female employees should be presumptively entitled to relief.

IV. The Sixth Circuit's Decision Emasculates the Counsel Fee Provision of Title VII

After ruling for plaintiff on the merits, the district court awarded a counsel fee of $75,000 to plaintiffs' attorneys (*infra,* p. 35a). This fee covered approximately 750 hours of work on a case which had been in litigation for over five years, including extensive discovery, an earlier appeal to the Sixth Circuit, a petition for certiorari, a trial, and proceedings before a special

master. The bulk of these hours were spent on the liability phase of the case.

The Court of Appeals upheld the finding of class wide liability and the individual back pay award, but remanded the class back pay award and severely limited the class injunctive relief (*infra,* p. 3a). In its first opinion, however, the Sixth Circuit flatly forbade any award for the liability phase of the class action claim regardless of what occurred on remand:

> After the Court has determined the claims of each individual member of the class, the Court shall then determine the reasonable value of the legal services and expenses incurred in such representation on the remand. Because of our reversal of the judgment with respect to the class action aspects of the case, no allowance can be made for legal services and expenses incurred for prior representation of the class. (*infra,* p. 21a).

On petition for rehearing, the Court of Appeals issued a different restriction on any counsel fee:

> After determining the allowance to be made to plaintiff for attorney's fees in representing her individually, the District Court shall separately determine the reasonable value of the legal services rendered to, and expenses incurred by, the plaintiff in obtaining the injunction and in establishing the illegality of the company's challenged practices. In making that determination the Court shall consider the amount finally allowed to the class. In other words, if the recovery by the class is in only a small amount, an award such as was

previously made by the District Court could not be supported. (*infra*, p. 38a)

Thus, the amount of the class back pay award is to place a ceiling on the counsel fee, regardless of the need for or value of the legal services that resulted in the granting of injunctive relief. Even if the liability phase alone required $75,000 worth of legal services, an issue the Sixth Circuit did not consider, and even if the injunctive relief was worth millions of dollars to the class members, a $75,000 award would be "excessive."

This rule is squarely contrary to the uniform practice in other Circuits which have followed *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 717-20 (5th Cir. 1974), *cert. denied*, 423 U. S. 864 (1975), in considering "the amount involved and the results obtained" as only one of many factors determining counsel fee awards in civil rights cases.[9] These circuits recognize that, where a Title VII action has corrected "across-the-board discrimination affecting a large class of an employer's employees the attorney's fee award should reflect the relief granted," *id.* at 718, and that sole reliance on the amount of monetary recovery

[9] *Evans* v. *Sheraton Park Hotel*, 164 U. S. App. D. C. 86, 96-97, 503 F. 2d 177, 187-88 (D. C. Cir. 1974); *King* v. *Greenblatt*, 560 F. 2d 1024, 1026 (1st Cir., 1977), *cert. denied*, 98 S. Ct. 3146 (1978); *Prate* v. *Freedman*, 17 F.E.P. Cases 1572, 1576 (2nd Cir., 1978); *Rodriguez* v. *Taylor*, 569 F. 2d 1231, 1247 (3rd Cir., 1977), *cert. denied*, 436 U. S. 913 (1978); *Walston* v. *School Board of City of Suffolk*, 566 F. 2d 1201, 1204-05 (4th Cir. 1977); *Hairston* v. *R & R Apartments*, 510 F. 2d 1090, 1093 n. 3 (7th Cir. 1975); *Allen* v. *Amalgamated Transit Union Local* 788, 554 F. 2d 876, 884 (8th Cir.), *cert. denied*, 434 U. S. 891 (1977); *Fountila* v. *Carter*, 571 F. 2d 487, 496 (9th Cir., 1978).

renders a counsel fee award inadequate. *Walston* v. *School Board of City of Suffolk, supra*, 566 F. 2d at 1204. Congress, in enacting the Civil Rights attorneys' fee awards Act of 1976, Pub. L.N. 94-559; 42 U.S.C. §1988, specifically approved the *Johnson* standards and noted its intention "that the amount of fees . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases and not be reduced because the rights involved may be non-pecuniary in nature." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976); see also, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976).

In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), this Court held that under Title II of the 1964 Civil Rights Act reasonable counsel fees must be awarded to a prevailing plaintiff "unless special circumstances would render such an award unjust." 390 U. S. at 403. The Court has recognized that this standard is equally applicable to cases brought under Title VII. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 417 (1978). The fact that fees are sought for winning injunctive relief, rather than for obtaining a large monetary award, is not such a "special circumstance." On the contrary, *only* injunctive relief had been obtained in *Newman, id.*, and a grant of injunctive relief was the sole basis for the fee award upheld by this Court in *Hutto* v. *Finney*, 57 L. Ed. 2d 522, 536-40 (1978). If in Title VII actions in the Sixth Circuit substantial counsel fees cannot be awarded unless there is also a large back pay recovery, plaintiffs will be forced to defer litigation until the size of the accrued

claim is large, and "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman* v. *Piggie Park Enterprises,* 390 U. S. at 402.

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

JAMES C. HICKEY
HIRAM ELY, III
EWEN, MACKENZIE & PEDEN, P.S.C.
2100 Commonwealth Building
Louisville, Kentucky 40202

JACK GREENBERG
ERIC SCHNAPPER
PATRICK O. PATTERSON
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Petitioner

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

_____

JANE MITCHELL - - - - - - - *Petitioner*

v.

MID-CONTINENT SPRING COMPANY OF KENTUCKY - - - - - - - *Respondent*

_____

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served with the Petition for Writ of Certiorari have been served as follows:

I certify that I have served three copies of the Petition for Writ of Certiorari upon the respondent by causing the same to be deposited in envelopes at the United States Post Office, Louisville, Kentucky, with air mail, first-class postage pre-paid, addressed to Thomas M. Hanna, Esq., 1153 Pierre Laclede Building, Forsyth at Hanley, St. Louis, Missouri 63105.

February 7th, 1979.

JAMES C. HICKEY
EWEN, MACKENZIE & PEDEN, P.S.C.
2100 Commonwealth Building
Louisville, Kentucky 40202

Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-3009

JANE MITCHELL - - - - - *Plaintiff-Appellee*

v.

MID-CONTINENT SPRING COMPANY OF KENTUCKY - - - - *Defendant-Appellant*

Appeal from United States District Court
for the Western District of Kentucky,
Paducah Division.

OPINION—Decided and Filed September 8, 1978.

Before: PHILLIPS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

WEICK, Circuit Judge. This class action was brought in the District Court by plaintiff-appellee, Mrs. Jane Mitchell (Mitchell), against defendant-appellant, Mid-Continent Spring Company of Kentucky (Mid-Continent), a corporation, her employer, alleging sex discrimination against her and on account of her discharge for engaging in protected activity, in violation of § 703(a) of Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and requesting equitable relief.[1]

The suit was brought in Mitchell's own behalf and in behalf of the class of all females employed by Mid-Continent on or after July 2, 1965, the effective date of the Act, all of whom, she alleged, were discriminated against with respect to wages and job assignments. The District Court certified the Class, as prayed for.

Following a bench trial the District Court found in favor of Mitchell and her class, in all respects. The issue of back pay was referred to a Special Master, who recommended that Michell recover on her individual claim $24,528.86 in back pay, and that an additional $222,885 be divided among all members of the plaintiff class, according to a formula and certain qualifying criteria. The Court accepted these recommendations and entered judgment therefor, and ordered Mitchell reinstated if she desired; and, in addition, the Court awarded Mitchell and the class a total of $75,000 in attorneys' fees, plus expenses of $2,427.32. Finally, the Court ordered relief against further discrimination and imposed an affirmative action plan, including the imposition of a quota of 33-1/3% of all new female employees to be assigned to formerly male job classifications, for the next five years, and 33-1/3% of all newly hired males to be assigned to formerly female job classifications, for the next five

[1]The original complaint in this case was filed on April 12, 1971. On November 16, 1971 the District Court granted summary judgment for defendant on the ground that plaintiff's charge had not been referred to the Kentucky Human Rights Commission, as required by 42 U.S.C. § 2000e-5(b). On appeal this Court vacated the judgment and remanded with instruction to retain jurisdiction long enough to permit such resort to available state remedies. *Mitchell* v. *Mid-Continent Spring Co. of Ky.*, 466 F. 2d 24 (6th Cir. 1972), *cert. denied*, 410 U. S. 928 (1973). In her amended complaint, styled "Second Amended Complaint," plaintiff alleged exhaustion of all such remedies, and this is no longer an issue in the appeal.

years. Mid-Continent was also required to make reports to plaintiff's attorneys.

For the reasons that follow, we are of the view that the judgment of the District Court should be affirmed only with respect to relief granted plaintiff Mitchell, individually, and the injunction against further discrimination. We reverse the judgment with respect to the issue of class-wide liability for back pay, totaling $222,885, the affirmative action plan involving quotas, and the award of attorneys' fees plus expenses.

I

Mitchell was first employed by Mid-Continent on August 6, 1962. In early 1969 she contacted the Wage and Hour Division of the United States Department of Labor, alleging that the Company discriminated against female production workers. An investigation was made during the period of July 2-18, 1969, by Compliance Officer Herbert L. Livingston. At the conclusion of his investigation Livingston advised Louis Langhi, President of Mid-Continent, that although no violations of the Equal Pay Act had been found to exist, the Company's practice of assigning higher-paying jobs exclusively to males (which will be discussed further, below) appeared in his opinion to be in violation of Title VII. Livingston recommended that Langhi contact the EEOC for assistance in bringing the company into compliance.

Langhi became incapacitated subsequently in 1971, because of brain surgery which left him virtually unable to speak, and partially paralyzed. His wife then assumed control of the company.

On or about July 29, 1969 Mitchell mailed a letter of complaint to the Cleveland Regional Office of the EEOC. This letter constituted a charge of discrimination under EEOC guidelines. 29 C.F.R. § 1601.11(b). The EEOC replied on August 1, enclosing two blank EEOC charge forms, one for

plaintiff's use, and one for the possible use of employee, Louise McGehee, who had been promoted from her lower-paying machine operator position to a higher-paying inspection position, immediately after the Wage and Hour investigation.

On August 7 Mitchell approached McGehee, while in the company parking lot, before working hours, and asked her if she would like to make a complaint. McGehee refused, and reported to her foreman, Clyde Warren, that Mitchell had asked her to sign a complaint regarding wages, which complaint was to be sent to the federal government.

On August 11, 1969, Jane Mitchell was instructed to come to the office of Ward Mitchell (no relation to Jane), the company's plant superintendent. Clyde Warren and others were present at the meeting. There was discussion about the Government papers that Mitchell had been circulating, after which Ward Mitchell took from his desk drawer Jane Mitchell's final paycheck, which was already prepared. In Mitchell's words, he said, "I'm going to tell you, you are a good worker, but you're a trouble maker . . . . I'm going to have to let you go." (App. 154).

On August 14 Jane Mitchell made a second complaint to the EEOC, charging a retaliatory discharge. She was granted leave by the EEOC to file this suit.

On the basis of this evidence the District Court found that Mitchell was fired in retaliation for having engaged in protected activity, in violation of § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a).[2] She was awarded back pay of

[2]Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor

(Footnote continued on following page)

$24,528.86, and, if she so desired, was ordered reinstated in her previous employment with full seniority and benefits.[3]

On appeal Mid-Continent asserts two justifications for Mitchell's discharge. First, Mid-Continent claims that Mitchell violated the company's rule against solicitation on company property. The District Court specifically rejected this defense on the ground that the employee handbook issued by the company did not list this offense as one justifying immediate discharge, and no employee had ever been discharged for violation thereof. Further, the rule applied only to solicitations during business hours; and the solicitation of McGehee took place before business hours.

Second, Mid-Continent cited past instances of boisterous behavior and misconduct, including disputes with other employees, on Mitchell's part. The last such incident, however, took place at least a year prior to the discharge, and Mitchell had continued to receive regular pay increases during her entire tenure. No negative remarks had been entered on her personnel record.

Section 704(a) has been construed broadly to prohibit "discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp* v. *Green*, 411 U. S. 792, 796 (1973). Mitchell's action in filing a charge

(Footnote continued from preceding page)

organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

In the alternative, the District Court found the defendant liable under the analogous section of the Fair Labor Standards Act. § 15 (a)(3), 29 U.S.C. § 215(a)(3). Because liability under Title VII adequately supports the Court's judgment, it is unnecessary for us to consider this portion of the Court's conclusions.

[3]No contention has been made by the Company on appeal with respect to the amount of back pay awarded to Mitchell.

with the EEOC was plainly protected by this section. See *Hicks* v. *ABT Assoc., Inc.*, 572 F. 2d 960, 968-69 (3d Cir. 1978); *Pettway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998, 1004-07 (5th Cir. 1969).

We hold that the District Court's findings of fact supporting Mitchell's individual claim are supported by substantial evidence and are not clearly erroneous. We therefore affirm this portion of the judgment.

II

Mid-Continent is a manufacturer of precision springs. The plant contains fifteen departments, each headed by a foreman, and each department consists of a separate job category. The manufacturing process begins when wire of the proper specification is sent to the coiling department, where the machines are "set up" to produce springs according to customer specifications. After coiling, the springs are tempered by heat-treatment and then tested. At this point the springs are sent to other various departments for further processing: to Secondary Operations for sizing on a "kick press," if needed; to the grinding room; to "hopper-looper," where loops are placed on the ends of the springs; to "four-slide," where angles are formed in the springs; to torsion, which further coils springs and attaches "legs"; or to the paint department.

In both Secondary and Grinding operations the work is light, and the female machine operators in these departments remain seated while working. In Secondary, the female workers operate kick presses, and in Grinding they load and unload grinding machines, both relatively unskilled tasks. In the other departments, however, the work is heavier and is more difficult. In the set-up functions, workers are required to make precise, mathematical computations and adjustments with complex machinery in accordance with both blueprints and written specifications. These

functions require skill and training, which many women either do not possess or do not desire to undertake. Other positions require various amounts of lifting of heavy coils of wire and quantities of springs, exposure to high temperatures, and untidy work conditions. These departments also require employees to work during the second or night shift when necessary to fill customers' orders. Married women who have young children, or who live in the country, did not like the night shift.

Consequently, employees who perform these more difficult jobs are higher paid than are machine operators in the Secondary and Grinding departments. These more difficult jobs have been performed traditionally by men employed by the company. As of August 6, 1973, machine operators started at $2.10 per hour and reached a maximum of $2.35 per hour after eighteen months. Set-up jobs, on the other hand, paid $2.20 per hour to start, and reached a maximum of $2.95 per hour after four years. The remaining job classifications at Mid-Continent were also higher-paid than machine operators, starting at $2.20 per hour and reaching $2.75 per hour after four years.

The record shows, and the District Court found as fact, that between July 2, 1965 and the time of the judgment, no female had ever been assigned to set-up, or to any other of the higher-paying positions.[4] On the other hand, no male had ever been assigned to the machine operator classifica-

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[4]Finding of Fact No. 15, App. 35, reads as follows:

Males have been employed and assigned exclusively since July 2, 1965, to the following job classifications: maintenance, inspection, torsion set-up, grinding set-up, coiler set-up, kick press set-up, four slide set-up, sample and heavy bench, hopper-looper set-up, truck drivers, shipping, warehouse and receiving, weighman, and janitor. On November 19, 1973, there were 95 men and no women employed in these classifications.

tions in Secondary and Grinding.[5] Further, no male had ever been transferred to the lower-paying positions, and only two machine operators had ever been promoted, under circumstances to be discussed below.

Mid-Continent did permit employee, Louise McGehee, to transfer from her machine operator position to the formerly-all-male inspection function; she was the first female ever to make such a transfer. This promotion occurred in July, 1969, subsequent to the investigation by the Wage and Hour Division. McGehee testified (App. 257) that she applied for the job when she heard "a rumor in the plant" that the company was looking for a female to fill it.

Aside from McGehee, only one other female transferred from the machine operator classification to any other position between July 2, 1965 and the date of the judgment. This transfer occurred on May 3, 1973, after commencement of this litigation, when Velma Ezell became a clerk in Mid-Continent's shipping department.

This system of sex-segregated job classifications and assignments was aggravated by the absence, until May, 1974, of any company-wide posting of job vacancies, and of any procedure by which employees could formally bid on higher-paying jobs.

Finally, Mid-Continent maintained a discriminatory practice and policy with respect to shift transfers. Set-up employees, according to plant superintendent Ward Mitchell, were hired for both the day and night shifts (App. 503), and a transfer between shifts was "[p]ermissible if they want to," subject to the needs of the company (App.

[5]Finding of Fact No. 14, App. 35, reads as follows:

> The E.E.O.C. investigation and the record in this case reveal that females were employed and assigned exclusively to the machine operator classification in secondary operations and grinding from July 2, 1965 to the present. No males have ever been assigned to that classification. On November 19, 1973, there were 124 female machine operators employed by Mid-Continent.

817). Female employees in Secondary and Grinding, however, were not permitted to transfer between the day and the night shifts (App. 502; *see* App. 789-92). Ward Mitchell acknowledged that the rationale for affording the male employees this more liberal policy was that "there was a shortage of men. However, females were easy to hire." (App. 819).

The consequence of this policy was that a shift change by a female was tantamount to a resignation and a rehire. In fact, two females, Casada and Stranger, actually did lose all seniority when they transferred, at their own request, from the night to the day shift.[6] (App. 303, 316, 499-501). The District Court found as fact that the company's policy was to consider transfer requests by males if they suited the company's needs but not to so consider the requests by females. Finding of Fact No. 20, App. 36.

A further consequence of the transfer policy was that the seniority records of female employees were divided into

[6]There was, however, evidence at trial that the two females in question had subsequently been granted full seniority. (App. 303-04, 315-16, 501). This evidence does not affect the Court's finding of a company policy of discouraging transfers by females.

Also asserted by Mitchell to be relevant to this issue is the testimony of employee Icie Lawrence. Lawrence was first hired on the night shift in November, 1958. She testfied that she forfeited fourteen months' seniority in January, 1960, when she began work on the day shift in Secondary Operations. Her testimony was as follows (App. 301-02):

> Q. Did you ever in the time that you were at Mid-Continent transfer between night and day or day and night shifts?
>
> . . .
>
> A. Well, I went to work the fifth day of November in '58 and I worked those two months in that year. Then, twelve months in '59 and then I went back on—*I quit the last day,* working day in December of '59 and then I went back on Monday morning, first work day, and I asked 'em to come on days . . . . [Emphasis added.]

The obvious import of this testimony is that Lawrence lost her seniority because she quit, not because of a discriminatory transfer policy.

separate day and night lists, while the records of males were not so divided. Finally, separate male and female seniority lists were kept which had the effect of segregating employees for seniority purposes, not by shift or by department, but by gender. The District Court found this system to be contrary to the EEOC guidelines set forth in 29 C.F.R. § 1604.3.[7]

On the basis of the preceding evidence the District Court found as fact:

> "[f]emale production employees were and are restricted and limited to the machinery operator classification, a base rate job, while men work in generally higher paying job classifications and have and can transfer [sic] to higher paying job classifications." Finding of Fact No. 18, App. 36.

The Court concluded that the practice of steering females into the lowest-paying positions constituted discrimination and segregation on the basis of sex in violation of § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a).[8] The company's discriminatory shift-transfer and seniority policies were held to be further violations.

[7]Although not binding on the courts, EEOC guidelines constitute an interpretation of Title VII by the agency charged with its enforcement and are entitled to great deference. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 431 (1975).

[8]Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

We affirm these holdings as supported by substantial evidence. They are supported by the testimony of the Company's own plant superintendent, Ward Mitchell. Ward Mitchell made all hiring and assignment decisions. (App. 783, 786). He stated that he assigned females only to lower paying positions because "that's the type of work that's open for them to do." (App. 787). The only justification asserted for this attitude was that the other positions required lifting. (App. 787, 794-95). However, no tests were made of job applicants' physical strength (App. 788, 795) and no studies were made of the weight-lifting, skill, intelligence or dexterity requirements of any job in the plant. (App. 827). Neither specialized skills nor pre-employment training was required for any production job. (App. 788).

Rather than tests applicants or impose requirements, Ward Mitchell simply believed that only men could successfully perform the Company's highest-paying jobs and that the females were not interested in these jobs. (App. 795-97, 826). In an answer to an interrogatory the Company admitted that sex was not a bona fide occupational qualification for any job in the plant within the meaning of Title VII. (App. 334-35).

In spite of this admission and in spite of the absence of any evidence of an actual lifting requirement, the Company maintains that it was merely being protective of its female employees, and argues that its "overprotective attitude" should not be held to constitute discrimination. Ward Mitchell also testified that he "never had one of the women in our plant down there come to me and want to get on the machines—not one."

This argument has been consistently rejected and is without merit. Even a bona fide lifting requirement cannot be implemented by the blanket exclusion of all females.

Bowe v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 718 (7th Cir. 1969). Rather, it may be implemented only by a valid test measuring strength directly. *Dothard* v. *Rawlinson*, 433 U. S. 321, 332 (1977). Regardless of the difficulty of measuring individual characteristics, Title VII prohibits the use of popular stereotypes or even statistical data to "attribut[e] general group characteristics to each individual member of the group." *Manhart* v. *City of Los Angeles*, 553 F. 2d 581, 586, 590-91 (9th Cir. 1976), *vacated and remanded on other grounds*, 956 S. Ct. 1370 (1978). *Accord*, *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544, (1971) (Marshall, J., concurring).

The unlawful restriction of female applicants and employees to its lowest-paying positions, the Company's differential shift-transfer policy and its consequent maintenance of separate seniority lists constitute violations of Title VII. These policies placed burdens on females that males were not required to suffer. *Cf. Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 141-42 (1977); *Palmer* v. *General Mills, Inc.*, 513 F. 2d 1040, 1043 (6th Cir. 1975).

The Company also contends that the intent requirement of Title VII has not been proven, on the ground that there is no evidence that any females applied for promotions or even desired to work in higher-paying positions and therefore the Company never had occasion to "discriminate." We find this argument to be without merit for it misses the point. The standard of this Circuit under Title VII is that females must have *equal employment opportunities*, not merely that their applications, if any, be processed fairly. *Senter* v. *General Motors Corp.*, 532 F. 2d 511, 529 n.58 (6th Cir.) *cert. denied*, 429 U. S. 870 (1976); *Palmer* v. *General Mills, Inc.*, 513 F. 2d 1040, 1043 (6th Cir. 1975); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 878 (6th Cir. 1973).

In *Dothard* v. *Rawlinson*, 433 U. S. at 330, the Supreme Court cautioned against the argument that a finding of unlawful discrimination must be based on the impact of defendant's (Company's) practices on actual applicants, stating:

> The application process might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. *See Teamsters* v. *United States*, 431 U. S. 324, 365-367. A potential applicant could easily determine her height and weight and conclude that to make an application would be futile.

In our case the District Court found on the basis of substantial evidence, that defendant (Company) exhibited the requisite disregard for the consequences of its acts to satisfy Title VII. Conclusions of Law Nos. 13, 14, App. 40. *See Dothard* v. *Rawlinson*, 433 U. S. at 328 & n. 11; *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 335 n.15 (1977).

III

Our agreement with the District Court on the liability issue, that a discriminatory system existed, does not conclude the matter, for the extent of the Company's liability for back pay to the class must yet be determined. At the time the complaint was filed, Section 706(g) of the Act, 42 U.S.C. § 2000e-5(g) read as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which

may include reinstatement or hiring of employees, with or without back pay . . . .[9]

The District Court, after finding liability in its order of November 26, 1974, turned to the issue of back pay, stating: "Each female production employee at Mid-Continent from July 2, 1965 to the present, must now be given an opportunity to describe the harmful effect of discrimination on her individual employment position." Conclusion of Law No. 18, App. 41. On January 20, 1975, the Court appointed a Special Master to determine the back pay of each class member and provided guidelines, ordering, *inter alia*:

> 5. The Special Master shall devise a formula for computing the difference in wages earned by members of the class listed in Guideline 1 [all female employees . . . who have been employed at any time from July 2, 1965 to the present time"], and male employees with the same or substantially the same date of hire by Mid-Continent. These differences . . . plus interest at 6% per annum shall be charted for each member of the class. . . . [Guideline 5, App. 46.]
>
> . . . .
>
> 9. The Special Master should keep in mind that the defendant has the burden of establishing by clear and convincing evidence, that the particular class member would not have earned the wages, even if Mid-Continent had not limited and segregated female employees . . . [Guideline 9, App. 47.]

Pursuant to these guidelines, the Special Master devised the following formula for calculating the back pay due each class member:

[9]Although on its face § 706(g) appears to contemplate that back pay will be awarded only as an adjunct to reinstatement or hiring, this section has been interpreted to permit the back pay remedy to stand alone. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415-16 (1975).

(1) The differential between the average wage for females and the average wage for males for each year from 1967 through 1974 was determined from actual pay records of employees who worked the entire year, and conservative figures were estimated for 1965 and 1966.

(2) It was assumed that in the absence of discrimination, 25% of the "male" jobs existing in any year would have been held by females. The figure of 25% is the percentage of females in the local work force in Christian County, Kentucky according to the 1970 Census.[10] The number of jobs thus assumed to belong to females was multiplied by the male-female wage differential, to arrive at the total amount "lost" to the plaintiff class each year.

(3) A list of eligible class members was compiled for each of the ten years at issue, consisting of all females who worked for the Company for at least six months during the given year. If a female worked a total of six months during two consecutive years, she was included in the year in which she worked the greater period of time. Thus, 92 of the 340 class members were excluded, leaving 238 persons eligible for back pay.

(4) The total amount of wages "lost" by females in each year was equally divided among all the eligible class members for that year.

The result of this computation (before minor adjustments) was that the maximum award for a female working the entire ten-year yeriod was $2,631.40 and the maximum award for any one year was $312.25. The total award was $222,885, the average award amounting to $1,026.20.

The Special Master then discussed the burden of proof required to be borne by each individual member of the plan-

[10]This assumption was unfounded. The fact that women comprise 25% of the work force in the county where Mid-Continent's plant is located is no evidence that 25% of the jobs at Mid-Continent which have been held by men between 1965 and 1974 would have been held by women.

tiff class, in order to qualify for a share in the award thus calculated, pursuant to Conclusion of Law No. 18, App. 41. The Special Master described that burden as "very light" and stated, quoting *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 259-62 (5th Cir. 1974), that "[t]here is no way of determining which jobs the class members would have bid on and have obtained if discriminatory testing, seniority, posting and bidding system [sic] . . . had not been in existence." *Id.* at 260. In such a situation, involving a "quagmire of hypothetical judgment", *id.*, the Special Master found that "a classwide approach to the measure of back pay is necessitated", *id.* at 261. This decision was based on the large number of class members (340), the total length of time involved (ten years) and the difficulty of isolating the effects of the various discriminatory assignment, seniority and transfer policies.[11] The Special Master, with the approval of the District Court, concluded as follows:

> [T]he initial burden has been met by all those female employees who were shown by company records to have been hired during the period involved and subsequently frozen into the female job classification for more than six months. In other words, those 238 class members determined to be eligible for sharing in one or all of the ten funds herein have met the initial burden of proof and it is now incumbent upon the defendant to show by convincing evidence that other factors would have prevented [sic] the economic loss determined herein regardless of the defendant's discriminatory employment practices. [App. 58.]

[11] In her brief, Mitchell states, at page 20:

> It is now totally impossible to determine in any way what individual female employees and new hires would have done and otherwise what would have happened if Mid-Continent had begun on the effective date of the Act, July 2, 1965, to assign males hires (there were 418) as machine operators and female hires to all other job classifications on a completely non-discriminatory basis.

This is a frank admission that it is impossible for the individual class member to have her case determined without the use of a nebulous formula, based in part on supposition, such as was devised by the Special Master and approved by the District Court. The amicus brief of the EEOC, under "Issues Presented", at 2, asserts the propriety of the use of the formula "in light of the impossibility of individual determinations in this case".

If it is true that individual determinations are impossible, the class action aspects of this case should forthwith be dismissed. No individual should ever be permitted to recover damages in a case which he or she finds it is impossible to prove.

In taking this approach, the District Court did not have the benefit of the decision of the Supreme Court in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977). This decision acknowledged that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to submit themselves to the humiliation of explicit and certain rejection." *Id.* at 365. Nevertheless, the Court, with respect to non-applicants held:

> Individual nonapplicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief accordingly. . . . [*Id.* at 364.]
>
> A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices. . . . [*Id.* at 367-68.]
>
> [T]he Government [plaintiff] must carry its burden of proof, with respect to each specific individual, at the remedial hearings to be conducted by the District Court on remand. [*Id.* at 371.]

In our case, the burden of proof was erroneously imposed on Mid-Continent by the Special Master and District Court. There was indeed evidence that some of Mid-Continent's female employees desired better jobs but were deterred by their belief that making an application would be a "useless act serving only to affirm a discriminatee's knowledge that the job he wanted was unavailable to him," (431 U. S. at 367). There was testimony by several witnesses (App. 630-717) that the general assumption among Mid-Continent employees and management was that females were to keep in their place. Some females complained that they were subjected to harassment and disrespect by male employees, (*e.g.*, App. 682-83, 714-17) and believed that if they applied for better jobs they would either be fired outright or be trained inadequately and then fired for incompetence.

On the basis of this evidence, the District Court found that "[a] female employee with knowledge of Mid-Continent's policies and practices could hardly be expected to make a meaningless and futile request to be transferred to a male job." Finding of Fact No. 16, App. 40. All of this, however, relates to the issue of liability and has no bearing on the remedy.

This showing was insufficient under *Teamsters* and the judgment must therefore be reversed. On remand, the District Court must determine the application for a job asserted by each individual class member. It will have the guidance of the Supreme Court's extensive discussion (431 U. S. at 367-72) of the manner in which class members' burdens must be carried (stating in part):

> The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified, the Court must, as nearly as possible, " 'recreate the conditions and relationships that would have been had there been no' " unlawful discrimination. *Franks* [v. *Bowman Transportation Co.*], 424 U. S. at 769. 431 at 371-72.

At the evidentiary hearing on the remand, the Company will have the right to question the fitness of any applicant to perform the job which she seeks or to show that it has other persons it desires to hire who can better perform the work.

IV

In its conclusions of law entered November 22, 1974, the District Court held (App. 42):

> 20. The Court is aware that affirmative relief will be required to insure equal job opportunities at the Mid-Continent plant for present female employees and to insure that future hires will be assigned on a non-discriminatory basis. 42 U.S.C. § 2000e-5(g). *Castro* v. *Beecher*, 459 F. 2d 725 (CA 1, 1972).
>
> 21. The Court is further aware that affirmative action on the part of Mid-Continent is essential to remedy the continuing consequences of past discrimination, and to insure that all employees understand that Mid-Continent is henceforth committed to equality of employment opportunity without regard to the sex of the employee.

Accordingly, the Court in its judgment of October 14, 1976 (App. 121-23), properly enjoined Mid-Continent from further discriminatory classifications and practices. The Court went further, however, and ordered an affirmative action plan as well. The Court ordered that for five years

all vacancies in previously all-male positions were to be first offered to current female employees in order of seniority, and at least one-third of those persons transferring into such positions were to be female. Also, for a period of five years one-third of all newly-hired females were to be assigned to previously all-male jobs, and one-third of all newly-hired males were to be assigned to previously all-female jobs. This plan was stayed by the District Court pending appeal.

We reverse this portion of the judgment, finding nothing in the record to justify such affirmative relief. Indeed, the Court's 1974 conclusion that affirmative action would be necessary is undercut by the subsequent findings of its Special Master. On May 13, 1976, in denying back pay for 1975 and succeeding years, the Special Master stated (App. 97):

> The evidence presented at the hearing before the Special Master indicates that the defendant made several more bonafide [sic] offers for job transfers to female employees during 1975 and 1976 [in addition to those in 1974], and that female employees began to bid on these jobs during 1975. Currently, two female employees are working in what were formerly male jobs. The Special Master has determined that *the "residual effects" of the company's prior practices and policies diminshed greatly in 1975* as female employees began to realize that *formerly male jobs were, in fact, open to them.* [Emphasis added.]

The Special Master added that although no injunction had at that time been issued by the District Court, it was the Special Master's belief that the Court's 1974 findings against the defendant "may have had some effect" in eliminating the residual effects of defendant's prior discrimination. (App. 97).

In view of the eventual issuance of the injunctive relief and the finding that all jobs were, in fact, open to females, we see no factual justification for the imposition of the affirmative action plan.

V

We also vacate the allowance of attorneys' fees of $75,000 and expenses in the amount of $2,427.32. On remand, the Court shall first determine at an evidentiary hearing the fair and reasonable value of the attorneys' services and expenses that should be allowed for legal services in representing Mitchell individually.

After the Court has determined the claims of each individual member of the class, the Court shall then determine the reasonable value of the legal services and expenses incurred in such representation on the remand. Because of our reversal of the judgment with respect to the class action aspects of the case, no allowance can be made for legal services and expenses incurred for prior representation of the class. The issue as to whether any modification of the injunction should be made can also be determined on the remand.

The judgement of the District Court is affirmed in part, reversed in part, and vacated in part, as hereinbefore ordered, and is remanded with instructions to conduct further proceedings consistent with this opinion. Costs in connection with Mitchell's individual claim are to be assessed against Mid-Continent as well as costs incurred by it.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 2164-P

JANE MITCHELL - - - - - - - - - *Plantiff*

v.

MID-CONTINENT SPRING COMPANY
OF KENTUCKY - - - - - - - - *Defendant*

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Entered November 26, 1974

FINDINGS OF FACT

The Court finds:

1. This action was filed on April 12, 1971, and is brought under the provisions of Title VII of the 1964 Federal Civil Rights Act, 42 U.S.C. §§ 2000e, *et. seq.*, and pursuant to 28 U.S.C. §§ 1331(a) and 1343 (3). It arises out of charges filed with the United States Equal Employment Opportunity Commission by the plaintiff, Jane Mitchell, alleging discrimination in employment on account of sex by the defendant, Mid-Continent Spring Company of Kentucky, and retaliation against her for engaging in activity protected by the provisions of 42 U.S.C. § 2000e-3(a) and 29 U.S.C. § 215(a)(3).

2. Plaintiff, Jane Mitchell, is a female citizen of the United States and the Commonwealth of Kentucky and resides at Route #3, Princeton, Kentucky. She was employed by the defendant, Mid-Continent Spring Company of Kentucky, on August 6, 1962, and was discharged from her employment with the company on August 11, 1969.

3. Defendant, Mid-Continent Spring Company of Kentucky, operates a plant at Hopkinsville, Kentucky, which manufactures coil springs for use as component parts in a variety of products manufactured by a variety of industries.

4. In the early summer in 1969, Jane Mitchell (then unbeknown to her employer) contacted the U. S. Department of Labor to complain about discrimination against female production employees in defendant's plant. An investigation of defendant's plant was made by Herbert L. Livingston, Compliance Officer for the Ware-Hour Division, U. S. Department of Labor, during the period from July 2, 1969, to July 18, 1969.

5. The company, i.e., the owner, Louis Langhi, was advised by Mr. Livingston that the investigation disclosed no violations of the Equal Pay Provisions of the Fair Labor Standards Act, but did disclose the jobs were classified as male and female jobs, and that female rates of pay were lower than male rates of pay. Mr. Livingston recommended to the company that it contact the United States Equal Employment Opportunity Commission for assistance in bringing the plant into compliance with Title VII of the 1964 Federal Civil Rights Act, 42 U.S.C. § 2000e, *et. seq.*

6. On or about July 29, 1969, Jane Mitchell, mailed a letter to the Cleveland Regional Office of the EEOC alleging that female production employees were unlawfully discriminated against by defendant at its Hopkinsville plant.

7. On August 1, 1969, the Cleveland Regional Office of the EEOC mailed a letter to Jane Mitchell confirming a telephone conversation of that date and referring to her

previous letter. The letter requested Jane Mitchell to fill out an EEOC charge form and further enclose an EEOC charge form for consideration by a fellow employee, Louise McGehee.

8. On or about August 7, 1969, Jane Mitchell approached Louise McGehee some 20 minutes prior to working time and asked her if she were interested in filing a charge with the U. S. Government concerning the unequal wages she was then receiving on her new job with Mid-Continent as an inspector. Louise McGehee reported this conversation to Clyde Warren, the assistant Plant Superintendent, and later discussed the conversation with Ward Mitchell, Plant Superintendent.

9. On August 11, 1969, Jane Mitchell was summoned to the office of Ward Mitchell, and was summarily discharged from her employment. Although Ward Mitchell and perhaps Clyde Warren attempted to get Jane Mitchell to disclose the full extent of her activities, I find they already knew enough to suspect that she was cooperating with either the Department of Labor or the EEOC, or was assisting those agencies. Her final pay check had been previously prepared and was presented to her. At the very least, Ward Mitchell indicates that it was his suspicion that Jane Mitchell was attempting to get Louise McGehee to sign some paper complaining about wages. Perhaps good and sufficient other reasons to fire Jane Mitchell for other causes existed, but at the time in question when she was fired, she was engaged in a protected activity under the law of the United States, which places the burden upon this Court to hold that she was improperly and unlawfully discharged under the facts then existing.

10. The company contends that Jane Mitchell was discharged for violating a no solicitation rule, but the employee handbook does not make this a dischargeable offense, and no other employee before or since has ever been discharged

for this claimed violation of a company rule, such problem of solicitation not having arisen.

11. On August 7, 1969, Jane Mitchell, mailed a signed and notarized EEOC charge form elaborating on her letter charge of July 29, 1969, to the Cleveland Regional Office of the EEOC.

12. On August 14, 1969, Jane Mitchell mailed a signed and notarized EEOC charge form alleging that her discharge of August 11, 1969, was retaliation for engaging in activity protected by Section 704(a) of Title VII of the 1964 Federal Civil Rights Act.

13. On October 29, 1969, William K. Edelen, an investigator for the EEOC, investigated the charges filed by Jane Mitchell.

14. The EEOC investigation and the record in this case reveal that females were employed and assigned exclusively to the machine operator classification in secondary operations and grinding from July 2, 1965, to the present. No males have ever been assigned to that classification. On November 19, 1973, there were 124 female machine operators employed by Mid-Continent.

15. Males have been employed and assigned exclusively since July 2, 1965, to the following job classifications: maintenance, inspection, torsion set-up, grinding set-up, coiler set-up, kick press set-up, four slide set-up, sample and heavy bench, hopper-looper set-up, truck drivers, shipping, warehouse and receiving, weighman, and janitor. On November 19, 1973, there were 95 men and no women employed in these classifications.

16. No male employee has ever been transferred to the machine operator classification in secondary operations or grinding.

17. Following the investigation of the plant by Herbert L. Livingston, in July 1969, one machine operator, Louise McGehee, was transferred to inspection. On May 3, 1973,

Velma Ezell became a shipping clerk in the shipping department. From July 2, 1965 to the present no other female employee has ever transferred from the machine operator classification to any other production job classification.

18. Female production employees were and are restricted and limited to the machinery operator classification, a base rate job, while men work in generally higher paying job classifications and have and can transfer to higher paying job classifications.

19. Defendant maintains separate seniority lists on the basis of the sex of the employees. Layoffs are made on the basis of the employee's seniority on these separate seniority lists.

20. Females were and are required to forfeit their accumulated seniority when transferring between the day and night shifts. Male employees could and can transfer shifts without loss of seniority. Male shift transfers are for the convenience of the employer, while female shift transfers are not.

CONCLUSIONS OF THE LAW

1. This action arises under Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et. seq.* and 28 U.S.C. §§ 1331(a) and 1343(3), and the Court has jurisdiction of the subject matter and of the parties.

2. This action was properly instituted and is properly maintainable as a class action under the provisions of Rule 23(b)(2) of the Federal Rules of Civil Procedure. The identifiable members of the class are all female employees of the defendant, Mid-Continent Spring Company of Kentucky, who have been employed at any time from July 2, 1965, to the present time. All females who may hereafter work for Mid-Continent are appropriately considered members of the class for purposes of declaratory and injunctive relief, which makes joinder of all members of the class impossible and impractical.

3. This action involves questions of law and fact common to all members of the class and the claim of plantiff is typical of the claims of the class, and such plaintiff is representative of and has and will fairly and adequately protect the interests of the class.

4. Prosecution of separate actions by individual members of the class would create risks of inconsistent or varying adjudications with respect to individual members of the class which could establish an incompatible standard of conduct for defendants. As a practical matter, any such adjudications would be dispositive of the interests of the other members of the class not parties thereto and would impede or substantially impair their ability to protect their interests. In addition, defendants have in the past acted or have refused to act on grounds generally applicable to the class involved herein, thereby making injunctive or corresponding relief with respect to the class as a whole appropriate.

5. Jane Mitchell filed a charge alleging unlawful discrimination because of sex at defendant's plant with the United States Equal Employment Opportunity Commission on or about July 29, 1969. 29 C.F.R. § 1601.11(b), 31 F.R. 10269, July 29, 1966.

6. Jane Mitchell was fired by defendant on August 11, 1969, in retaliation for having engaged in protected activity, in violation of 29 U.S.C. § 215(a)(3) and/or 42 U.S.C. § 2000e-3(a).

7. Female production employees at defendant's plant have been exclusively assigned and limited to the machine operator classification in secondary operations and grinding, base rate job classifications, in violation of the clear and express language of 42 U.S.C. § 2000e-2(a) which is as follows:

Section 703(a) provides:

"It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or natural origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

8. Mid-Continent's policy of denying women, considered generically, the opportunity to qualify for and hold jobs other than machine operator results in a descrimination because of sex under Section 703(a)(1). It also constitutes a limitation unon, segregation of, or classification of the company's employees in a way which would deprive or tend to deprive an individual of employment opportunities because of such individual's sex, within the meaning of subsection (2) of the quoted section.

9. Mid-Continent further maintained separate seniority lists on the basis of the sex of the employee. This violates 29 C.F.R. § 1604.3.

10. Refusal to allow female employees to transfer shifts without loss of seniority while allowing male employees to do so, is a further discrimination against female production employees which violates 42 U.S.C. § 2000e-(a).

11. The finding of the above described discriminatory practices, plus Mid-Continent's admission that sex is not a bona fide occupational qualification for any job in the plant

under Section 703(e) of Title VII, 42 U.S.C. §2000e-2(e)(1), has established liability on the defendant, Mid-Continent Spring Company of Kentucky, for the class of female employees represented by Jane Mitchell.

12. The fiinding of unlawful discrimination and the clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandate an award of back pay unless exceptional circumstances are present. *Head* v. *Timken Roller Bearing Company,* 486 F. 2d 870, 876 (CA6, 1973).

13. There are no exceptional circumstances in this case. The complete record in this action establishes a disregard of at least the spirit of the act on the part of Mid-Continent.

14. Mid-Continent argues that the Court does not have jurisdiction to fully remedy the violations of law which the Court has found. The only jurisdictional test which a complaint must meet is set forth in *Tipler* v. *DuPont,* 332 F. 2d 125, 131 (CA6, 1971);

"Rather, the complaint in the judicial proceeding is only limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination."

15. Mid-Continent argues that it did not intentionally violate Title VII. At the very least, the actions of Mid-Continent from July 2, 1965, to the present, have displayed a reckless regard for the consequences.

"But Congress directed the thrust of the act to the *consequences* of employment practices, not simply the motivation." *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 432, 28 L Ed 2d 158, 165, 91 S Ct. 849 (1971).

16. Mid-Continent says female employees should have asked to be promoted and transferred. A female employee

with knowledge of Mid-Continent's policies and practices could hardly be expected to make a meaningless and futile request to be transferred to a male job. *U. S.* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 369 (CA8, 1973).

The Act, after all, places the responsibility for equal employment opportunity on the employer and not on the employees. Section 703(a), 42 U.S.C. § 2000e-2(a).

See *Sabala* v. *Western Gillette, Inc.*, 371 F. Supp, 385, 7 FEP Cases 443, 448 (S. D. Tex., 1974).

17. This action was filed on April 12, 1971, and was pending in court on March 24, 1972, the effective date of the 1972 amendments to Title VII. Back wages and benefits to the class are payable from July 2, 1965, to the date of the final judgment to be entered herein. *U. S.* v. *Georgia Power Co.*, 474 F. 2d 906, 922 (CA5, 1973); *Johnson* v. *Goodyear*, 491 F. 2d 1364, 1378 (CA5, 1974); *Pettway* v. *American Cast Iron Pipe*, 494 F. 2d 211, 258 (CA5, 1974); *Garner* v. *Stephens*, 460 F. 2d 1144 (CA6, 1972); and *Kentucky-Tennessee Light and Power Company* v. *Moats*, 290 Ky. 690, 162 S. W. 2d 526 (1942).

18. Once unlawful discrimination against a class of employees has been established, a presumption for back pay arises in favor of the class members. (Each female production employee at Mid-Continent from July 2, 1965, to the present, must now be given an opportunity to describe the harmful effect of discrimination on her individual employment position.) Of course, unrealistic exactitude in computing awards is not required and all uncertainties should be resolved against discriminating employer, *Pettway* v. *American Cast Iron Pipe Company*, 494 F. 2d 211 (CA5, 1974), but not to punish the defendant, but to compensate those who were in fact victims of discrminiation. *U. S.* v. *Georgia Power*, 474 F. 2d 906 (1973).

19. Jane Mitchell will be immediately re-employed by Mid-Continent if she so desires, and the Master hereinafter

appointed will establish the total amount of her wages she would have reasonably earned from August 11, 1969, to this date, less actual earnings during that period, and from this amount fixed by the Master the Court will fix her award hereunder for lost wages, giving regard however in mitigation, for what the Court considers to have been her truculent action at the time of her discharge in failure to apprise and give notice to her employer as to what her actual activity was in the solicitation of Mrs. MeGehee; and she will be given an opportunity along with all other members of the Class to establish entitlement to any back pay because of systematic discriminatory policies and practices of Mid-Continent.

20. The Court is aware that affirmative relief will be required to insure equal job opportunities at the Mid-Continent plant for present female employees and to insure that future hires will be assigned on a non-discriminatory basis. 42 U.S.C. § 2000e-5(g). *Castro* v. *Beecher*, 459 F. 2d 725 (CA1, 1972).

21. The Court is further aware that affirmative action on the part of Mid-Continent is essential to remedy the continuing consequences of past discrimination, and to insure that all employees understand that Mid-Continent is henceforth committed to equality of employment opportunity without regard to the sex of the employee.

22. In view of the complexities involved in achieving the appropriate remedy and relief for Jane Mitchell and the class she represents, the parties shall within 30 days of the date of this order, submit to the Court their proposal for remedy and relief, and proposed guidelines for a Special Master to be appointed by the Court.

23. The plaintiff is entitled to recover from the defendant her costs, including a reasonable attorney's fee. A determination of the fee will be deferred until such time as the Court has determined the appropriate remedy and re-

lief. Within 21 days following the report of the Special Master, counsel for plaintiff and the class shall submit their affidavits and memoranda of law concerning appropriate fee, if the parties have not agreed upon the fee. Defendant will have 14 days thereafter within which to serve and file any desired response.

November 26, 1974

(s) James F. Gordon
United States District Judge

Copies to:
Counsel of record.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 2164-P(G)

JANE MITCHELL - - - - - *Plaintiff-Appellee*

v.

MID-CONTINENT SPRING COMPANY
OF KENTUCKY - - - - - *Defendant-Appellant*

JUDGMENT—Entered October 14, 1976

This cause having come before the Court for trial on November 18 and 19, 1974, and the Court having entered Findings of Fact and Conclusions of Law on November 26, 1974, the Court appointed Special Master having made his Final Advisory Report on August 30, 1976, and the Court being otherwise sufficiently advised.

IT IS HEREBY ORDERED AND ADJUDGED that the exclusive assignment, segregation, and limitation of female production employees of defendant, Mid-Continent Spring Company of Kentucky, to base rate machine operator positions since July 2, 1965, violates 42 U.S.C. § 2000e-2(a).

IT IS FURTHER ORDERED AND ADJUDGED that the maintenance of separate seniority lists and standards on the basis

of the sex of the employees since July 2, 1965, violates 42 U.S.C. § 2000e-2(a).

It Is Further Ordered and Adjudged that the defendant, Mid-Continent Spring Company of Kentucky, be enjoined and prohibited from:

(a) Maintaining, directly or indirectly, separate job classifications, wage rates and departments on the basis of the sex of the employees;

(b) Assigning any newly hired employees to a particular position solely upon the basis of the sex of said person; except as is necessary to carry out the affirmative action portion of this injunction required to remedy the present day effects of defendants unlawful practices;

(c) Maintaining, directly or indirectly, separate seniority lists, provisions, or standards on the basis of the sex of the employees;

(d) Causing any employee to be laid off, refused recall, or in any way disadvantaged in the terms, conditions, or privileges of employment because of such employee's sex.

It is Further Orderded and Adjudged that the defendant, Mid-Continent Spring Company of Kentucky shall:

(a) Provide the Plaintiff, Jane Mitchell, with the same seniority and benefits which she would have had if she had not been unlawfully terminated on August 11, 1969.

(b) For a period of five years from the date of this final judgment and permanent injunction, defendant shall maintain a priority pool of female employees in the order of their original date of hire, who shall be given the opportunity to transfer to job vacancies in all job classifications in defendant's plant in said order of seniority. Transfers into previously all male job classifications shall be at least 33-1/3% female, unless all female employees in the plant reject the opportunity to transfer to a particular position.

(c) For a period of five years from the date of this final judgment and permanent injunction, defendant shall assign

at least 33-1/3% of all male new hires to machine operator position in Secondary and Grinding, and shall assign at least 33-1/3% of all female new hires to the previously all male job classifications in defendant's plant.

It Is Further Ordered and Adjudged that the defendant, Mid-Continent Spring Company of Kentucky shall:

(a) Pay a total of $24,528.86 to the plaintiff, Jane Mitchell, as back pay for her claim of unlawful termination. Payment to her shall be made in the net amount after deductions required by law.

(b) Pay a total of $222,885.00 to the persons and class members listed on Exhibit A attached hereto and incorporated herein by reference. The respective gross amounts (before the applicable tax withholdings) to be paid to each such person also appears on said Exhibit A and payment to each such person shall be made only in the net amount after deductions required by law.

(c) Pay a total of $75,000.00 to counsel for the plaintiff, Jane Mitchell and her class, James C. Hickey and James W. Owens, as reasonable attorneys' fees in accordance with Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

This Court shall remove this matter from its active docket but retain jurisdiction of this action for a period of five years from the date of this final judgment and permanent injunction to insure the implementation of the terms of this Permanent Injunction, should plaintiff on motion request its reinstatement to active docket status for such purpose.

Every six months during the period of five years aforesaid, defendant shall report to plaintiff's counsel the names and sex of all transfers and new hires, with the job classification to which they were transferred or assigned. If all female employees reject transfer to a particular job classification, this should be reported to counsel as well.

This is a final judgment and there is no just reason for delaying its entry.

October 12, 1976

(s) James F. Gordon
Senior United States District Judge

Copies to:
Counsel of record.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-3009

JANE MITCHELL - - - - - *Plaintiff-Appellee*

v.

MID-CONTINENT SPRING COMPANY OF KENTUCKY - - - - - *Defendant-Appellant*

JUDGMENT—Filed September 8, 1978

Before: PHILLIPS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by the Court that the judgment of the said District Court in this cause be and the same is hereby is affirmed is part, reversed in part, vacated in part and the cause remanded for further proceedings with instructions.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered By Order of The Court
(s) John P. Hehman
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-3009

JANE MITCHELL - - - - - - *Plaintiff-Appellee*

v.

MID-CONTINENT SPRING COMPANY OF KENTUCKY - - - - - - *Defendant-Appellant*

ORDER—Filed November 9, 1978

Before: PHILLIPS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

No active Judge of this Court having requested that a vote be taken on appellee's suggestion that her petition for rehearing be heard en banc, the petition for rehearing was referred to the panel for disposition.

Upon consideration, we hereby modify our opinion only in the respect herein stated. After determining the allowance to be made to plaintiff for attorney's fees in representing her individually, the District Court shall separately determine the reasonable value of the legal services rendered to, and expenses incurred by, the plaintiff in obtaining the injunction and in establishing the illegality of the company's challenged practices. In making that determination the Court shall consider the amount finally allowed to the class. In other words, if the recovery by the class is in only

a small amount, an award such as was previously made by the District Court, could not be supported.

In all other respects, our opinion is hereby ratified, approved and confirmed. The petition for rehearing is accordingly denied.

Entered By Order of The Court
(s) John P. Hehman
Clerk

APPENDIX F

LABOR RELATIONS REPORTER

October 2, 1978, Vol. 99, No. 9, 99 Analysis 17

Availability of Back Pay For Class of Non-Applicant Discriminatees

DEVELOPMENT: Back pay for members of a class of female employees who were deterred by an employer's discriminatory practices from seeking better jobs with the employer must be determined on an individual basis and not through the use of a formula, the U. S. Court of Appeals at Cincinnati decides, reversing a federal district court. (*Mitchell* v. *Mid-Continent Spring Co.*, CA6, 1978, 17 FEP Cases 1594.)

Facts of Case

The employer employed women as machine operators in its grinding and secondary operations departments, but it would not employ them in other jobs in those departments. Although it permitted one woman to transfer from a machine operator position to an inspector position, this occurred after investigation by the Wage and Hour Division of the Labor Department. A second woman was given a transfer after filing of this lawsuit.

The effect of the employer's system of sex-segregated job classifications and assignments was aggravated by the absence of company-wide posting of job vacancies and of any formal bidding procedure. In addition, the employer discriminated in shift transfers; set-up employees, all men, were hired for both the day and night shifts, and a transfer between shifts was permitted, but women in the secondary and grinding departments were not permitted to transfer between shifts. Consequently, a shift change by a female employee was tantamount to a resignation and a rehire with

loss of seniority. The employer also kept separate male and female seniority lists, which had the effect of segregating employees for seniority purposes on the basis of gender.

The district court ruled that the employer's practice of steering women into its lowest-paying positions and refusing to let them work in other job classifications and shifts violated Title VII of the Civil Rights Act of 1964. The appeals court agrees. It says that the employer "placed burdens on females that males were not required to suffer."

The district court said that the women were entitled to back pay measured by the difference between what female employees earned from the effective date of Title VII to the present and what male employees earned in the same period.

A special master devised a formula for calculating the back pay due each class member. He took the following steps:

— First, he determined the differential between the average wage for women and the average wage for men for each year from 1967 through 1974 from actual pay records of employees who worked the entire year, and he estimated "conservative" figures for 1965 and 1966.

— Then, he assumed that because the percentage of females in the local work force in 1970 was 25 percent, 25 percent of the "male" jobs existing in any one year would have been held by women; he multiplied the number of jobs assumed to belong to women by the male-female wage differential to arrive at the total amount "lost" to the female employees in each year.

— Next, the special master compiled a list of eligible class members for each of the 10 years at issue, the list consisting of all women who worked for the employer for at least six months during the given year; a woman who worked a total of six months during two consecutive years was included in the year in which she worked the greater period of time.

—Finally, the total amount of wages "lost" by female employees in each year was divided equally among all the eligible class members for that year.

The special master pointed out that there was no way to tell which jobs the women would have bid on and obtained in the absence of discrimination. In view of the large number of class members (340), the total length of time involved (10 years), and the difficulty of isolating the effects of the various discriminatory assignment, seniority, and transfer policies, the special master took a classwide approach to the measure of back pay. He held that 238 class members had met their burden by showing that they had been hired during the period involved and subsequently been frozen into the female job classification for more than six months. The burden was now on the employer, he stated, to show by convincing evidence that other factors would have caused the economic loss regardless of its discriminatory practices. The district court agreed.

Appeals Court's Decision

In finding that the burden of proof was imposed erroneously on the employer, the appeals court points out that the district court did not have the benefit of the U. S. Supreme Court's decision in *Teamsters* v. *U. S.* (1977, 14 FEP Cases 1514). The Supreme Court held that while nonapplicants are entitled to an opportunity to prove that they should be treated as applicants, theirs is "the not always easy burden of proving that [they] would have applied for the job had it not been for [the employer's discriminatory] practices."

The appeals court takes note of evidence that some of the employer's female employees desired better jobs but were deterred by their belief that making an application would be a useless act and that they might be discharged if they applied for better jobs. It says that the district court must

"determine the application for a job asserted by each class member." The appeals court point out that the Teamsters decision requires the district court first to decide which of the women were actual victims of the discriminatory practices and then to recreate, as nearly as possible, the conditions and relationships that would have existed had there been no discrimination. It adds that at the evidentiary hearing, the employer will have the right to question the fitness of any applicant to perform the jobs she seeks or to show that it has other persons it desires to hire who can better perform the work.

The court takes note of statements by the individual bringing the action and by the EEOC that it is impossible to make individual determinations. It declares:

"If it is true that individual determinations are impossible, the class action aspects of this case should forthwith be dismissed. No individual should ever be permitted to recover damages in a case which he or she finds it is impossible to prove."

BACKGROUND: The classwide approach to the award of backpay was developed by courts to make it possible to award relief and yet avoid the "quagmire of hypothetical judgments" in large class actions covering long periods of time. (See *Pettway* v. *American Cast Iron Pipe Co.*, CA 5, 1974, 7 FEP Cases 1115, 1153-1156.)

The New Orleans, Chicago, St. Louis, and Denver appeals courts have approved or ordered classwide approaches to the determination of back pay. (*Sabala* v. *Western Gillette, Inc.*, CA 5, 1975, 11 FEP Cases 98, vacated, U S SupCt, 1977, 14 FEP Cases 1686; *Stewart* v. *General Motors Corp.*, CA 7, 13 FEP Cases 1035, 1040-1042, cert. denied US SupCt, 15 FEP Cases 31; *Wells* v. *Meyer's Bakery*, CA 8, 1977, 15 FEP Cases 930; *Love* v. *Pullman Co.*, CA 10, 1978, 16 FEP Cases 745, affirming DC Colo, 1976, 13 FEP Cases 423, 428-433).

Other decisions in which classwide formulas were adopted or regarded favorably include *Bowe* v. *Palmolive Co.*, CA 7, 1973, 6 FEP Cases 1132; *Stamps* v. *Detroit Edison Co.*, DC EMich, 1973, 6 FEP Cases 612, modified CA 6, 1975, 10 FEP Cases 239, 1063; *Head* v. *Timken Roller Bearing Co.*, DC SOhio, 1974, 7 FEP Cases 987; *U.S.* v. *U. S. Steel Corp.*, CA 5, 1975, 11 FEP Cases 553, 563; and *Senter* v. *General Motors Corp.*, DC SOhio, 1974, 11 FEP Cases 1068, affirmed CA 6, 12 FEP Cases 451.

For the most part, these decisions did not distinguish actual applicants from persons who were presumed to be interested but who were deterred from applying. Many of them presumed that nonapplicants who showed that they were members of the class discriminated against were entitled to relief as of the date that they were qualified for the job in question. (See *Johnson* v. *Goodyear Tire & Rubber Co.*, CA 5, 1974, 7 FEP Cases 627, 634.)

Thus, in the Stewart case, the Chicago appeals court found that a classwide approach was necessary for compensating black employees for the employer's failure to promote them to salaried positions because of their race, even though such an approach "may generate a windfall for some employees who would have never been promoted had vacancies been filled on a nonracial basis and under-compensate the genuine victims of discrimination by forcing them to share the award with their undeserving brethren." See also *White* v. *Carolina Paperboard Corp.*, CA 4, 1977, 16 FEP Cases 44.

SIGNIFICANCE: This decision raises the question of how the Supreme Court's Teamsters decision is to be reconciled with its earlier ruling in *Albemarle Paper Co.* v. *Moody.* (1975, 10 FEP Cases 1181).

The Court said in Albemarle that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the

central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." The Teamsters decision requires nonapplicant discriminatees to come forward and establish that they would have sought a job or a promotion at the time of the discrimination. The Supreme Court did not lay down any rule as to how a nonapplicant could prove his putative applicant status, but is suggested that evidence of an informal inquiry, an expression of interest, or even unexpressed desire might be sufficient.

The Teamsters discision does not appear to indicate how relief may be granted to rejected applicants and nonapplicants who establish their claim. However, the Cincinnati appeals court suggests that the Teamsters decision precludes the use of a back-pay formula for these persons, as well as for nonapplicants who do not establish an entitlement to relief. If the Cincinnati court is correct in finding that the Teamsters decision requires individual back-pay determinations, then the question arises as to whether an employer may escape back-pay liability altogether when its conduct renders individual calculation impossible.